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No. 88-523

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

RESPONDENT UNION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 881 ("the Union") herewith files its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by Jewel Food Stores, a Division of Jewel Companies, Inc. ("Jewel").

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT RAISES NO ISSUES DEMANDING IMMEDIATE REVIEW

Jewel requests that this Court grant its Petition for Certiorari to review an interlocutory order of the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. Sec. 1254(1). The issues raised by the Petition are (1) whether the Union owed a duty of fair representation to Respondents Kelly Merk et. al., ("Respondents") who were former employees of Jewel and former members of the Union; and (2) whether the courts below properly ruled that the action against Jewel was not barred by the statute of limitations.[1] (Petition, pp. 8-20 and 21-27)

No question exists that this Court rigorously limits its discretion to grant certiorari after final judgment because of its already enormous caseload. A fortiori only the most compelling reasons justify granting this extraordinary remedy to review an interlocutory order. As stated in *Denver v. New York Trust Co.*, 229 U.S. 123 (1913):

> "The exceptional power to review, upon certiorari, a decision of the circuit court of appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

Put most succinctly, these proceedings do not raise critical issues of national concern demanding immediate review such as the issues that were raised in the Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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1 The Union shall not address the limitations question because its resolution in the context of a direct breach of contract action against Jewel has no impact upon the Union.

This litigation in its present posture requires the district court to determine whether Jewel violated the collective bargaining agreement between Jewel and the Union by unilaterally reducing Respondents' wages and benefits in February, 1984 (Pet. Appendix A, p. A-13), and the remedy, if any, to which Respondents may be entitled.

Jewel argues that a denial of the Petition will cause it "extraordinary inconvenience" based on its suggested, but highly speculative scenario of future events. On the contrary, this Court's present expenditure of time is quite unnecessary. If Jewel were to ultimately prevail on the issue of whether its conduct was actionable by Respondents, this litigation would terminate. It would not then be necessary for this Court to address any of the questions raised by the Petition. Should Jewel be found to be liable to Respondents for having breached the contract, Jewel, by pursuing all appeals available to it, may cause this Court to be confronted with the issues now raised in the Petition. Jewel would only be required to litigate the Union's duty of fair representation (a previously unlitigated issue) and, perhaps, further litigate its breach of contract (if judgment already entered on that issue is not collaterally binding on the Union) assuming first, it is found liable, second, it seeks certiorari and certiorari is granted, and third, this Court then reverses and remands based on the issues raised herein.

In no event will a denial of the Petition irreparably foreclose Jewel from litigating the issues it here seeks to raise. Nor will a denial of the Petition disrupt the bargaining relationship between Jewel and the Union. Successor collective bargaining agreements have already been executed. Respondent former employees have, by definition, left Jewel's employ and the Union's membership. In short, resolution of the Union's duty to Respondent former employees can easily await the outcome of the normal litigation process.

II. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW WILL HAVE LITTLE IF ANY APPLICATION OUTSIDE OF THIS CASE

The Petition for Certiorari depicts the Court of Appeals' ruling here as a "sweeping decision that a union does not owe a duty of fair representation to former employees and does not bind them by a grievance settlement," (Petition, p. 8). This characterization is a total distortion of the Court of appeals' limited opinion carefully tailored to the particular situation here. Specifically, the opinion explicitly rests on the parties' agreement that all former employee respondents would not be considered "employees" under Section 2(3) of the NLRA, 29 U.S.C. Sec. 152(3). See Pet. Appendix A, p. A-10 ("[w]e follow the parties' lead in assuming that the 2,000 former workers are not statutory 'employees' – without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.") See also Pet. Appendix A, p. A-13 (conclusion based on "parties' failure to make arguments that might have avoided this consequence").[2]

The precedential value of the decision below is thus, to say the least, extremely limited. A decision that rests so entirely on various assumptions of law by the parties – and thus binds virtually no one other than the parties – is certainly not worthy of this Court's consideration.

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2 It is beyond challenge that the Court of Appeals rested its analysis on this premise, and the precedential value of the decision is thus restricted accordingly.

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT BELOW PROPERLY FOUND THAT THE UNION OWED NO DUTY OF FAIR REPRESENTATION TO RESPONDENTS AND ITS DECISION DOES NOT CONFLICT WITH THIS OR ANY OTHER COURT

The Court of Appeals found that the Union owed no duty to Respondent former employees following *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) because "[a] union need not represent non-employees." (Pet. Appendix A, p. A-10) Because Respondents are not statutory employees within the meaning of Section 2(3) of the NLRA, 29 U.S.C. Sec. 152(3) – a conclusion which the Court of Appeals rested in part on the parties' own legal arguments – "the Union does not represent them. The Union owes no duty to those it does not represent." (Pet. Appendix A, p. A-12)

Jewel asserts that the Union owed a duty to fairly represent Respondent former employees first, because at one time, the Union was Respondents' exclusive bargaining representative as were the unions in such cases as *Humphrey v. Moore*, 375 U.S. 335 (1942); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); and, secondly, because the Union undertook Respondents' representation, citing *Elgin, Joliet & Eastern Railway Co. v. Burley*, 327 U.S. 661 (1946); *Kesner v. N.L.R.B.*, 532 F.2d 1169 (7th Cir. 1976); *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329 (3d Cir. 1985). Petitioner thus asserts that the decision below conflicts with these cases.

The cases cited by Jewel are inapposite because such decisions either involve present employees for whom the union is indisputably the exclusive bargaining agent, or cases in which litigation was initiated to establish whether plain-

tiff is or will continue to be an employee within the meaning of Sec. 2(3) of the NLRA 29 U.S.C. 152(3). Thus, in *Humphrey* and *Elgin, Joliet and Eastern Railway*, plaintiffs were current employees within the bargaining unit represented by the union. In *Vaca, Bowen*, and *Hines*, plaintiffs were dischargees seeking to re-establish their status as employees and members of the bargaining unit represented by the union. The *Kesner* and *Koshatka* decisions also involve plaintiffs seeking to establish their positions as employees within the bargaining unit. Based on the *Pittsburgh Plate Glass* rationale, the Union simply did not owe a duty to Respondents once they were no longer "employees."[3]

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3 In *Republic Steel*, plaintiff's status as an "employee" was assumed without discussion by the parties and the Court. In any event, *Pittsburgh Plate Glass* was decided six years after Republic Steel, and is more analogous to these proceedings.

CONCLUSION

For the reasons stated above, Respondent, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881, respectfully requests this Court to deny Jewel's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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